Supreme Court U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ALUMINUM COMPANY OF AMERICA,
Petitioner,

v.

ESTHER JONES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Due Process, and a practical rather than technical construction of the Longshore Act, requires review of certain remand orders in which there is a conclusive determination of an important legal issue or legal standard, such as jurisdiction, or in which the Benefits Review Board has exceeded its statutorily defined powers of review?

2. Whether a remand label is dispositive, so that the Benefits Review Board may effectively preclude Petitioner's right of appeal of its determination of a dispositive legal issue by mischaracterizing the decision as a remand order or combining it with remand instructions?

3. Whether the Longshore Act may, consistent with Equal Protection and Due Process guarantees, penalize successful litigants by permitting appeal (and Petition for Review) of a substantial question of law on a jurisdictional determination *only* in a situation where there is an award of benefits?

4. Whether Longshore jurisdiction and coverage may be constitutionally extended to alleged injury and asbestos exposure occurring in a land based calcine alumina manufacturing plant, where the time of injury occurred while the worker was performing his primary job in the manufacturing plant, and the sole connection with Longshore status was the *potential* that the worker could spend about one percent of his time, involving occasional or sporadic work in maintaining an overland conveyor system, physically removed from the vessel discharge operations by another employer?

5. Whether Longshore status, like the test for Seamen status in *Latsis,* requires a substantial connection in point of time and work, and not merely occasional or sporadic?

6. Whether the unloading process ends, and overland transportation begins, for purposes of Longshore situs and

status, when bauxite cargo is discharged from vessels by another employer, at a separate facility, and placed on two separate conveyor systems, which are not physically connected?

LIST OF PARTIES

The Aluminum Company of America was the Respondent and Petitioner below and is Petitioner here.

Esther Jones, widow of Charlie Jones, Jr., was the Claimant and Respondent below, and is a Respondent here.

The U.S. Department of Labor and Director, Office of Workers Compensation Programs was a Respondent below and is a Respondent here.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Petitioner is Aluminum Company of America known as Alcoa Inc. as of January 19, 1999 ("Alcoa"). The following are Alcoa's non-wholly owned subsidiaries: Adela Investment Company S.A.; Alcoa (Shanghai) Aluminum Products Company Limited (China); Alcoa Alumina & Chemicals, L.L.C. (Delaware); Abalco S.A. (Brazil); Alumar Consortium—Alumina Refining Enterprise (Brazil); Mineracao Rio Do Norte S.A. (Brazil); Acap Singapore PTE Ltd. (Singapore); Alcoa ACC Industrial Chemicals Ltd. (India); Alcoa Kasei Limited (Japan); Alcoa Minerals of Jamaica, L.L.C. (Delaware); Jamalco (Jamaica); Halco (Mining) Inc. (Delaware); Compagnie Des Bauxites De Guinee (CBG) (Delaware); Moral Co. Limited (Japan); St. Croix Alumina, L.L.C.; Suriname Aluminum Company, L.L.C. (Delaware); N.V. Hotelmaatschappij "Torarica" (Suriname); Suralco-Billiton Joint Venture #1 (Suriname); Suralco-Billiton Joint Venture #2 (Suriname); Alumar Consortium—Alumina Refining Enterprise (Brazil); Alcoa Aluminio S.A. (Brazil); Afl Do Brasil LTDA (Brazil); Alcatel Cabos Brasil S/A (Brazil); Alcoa Fios E Cabos Electricos S.A. (Brazil); Alumar Consoritum—Aluminum Smelting Enterprise (Brazil); Alusud Embalajes Chile LTDA (Chile); Alusud Embalajes Colombia LTDA (Colombia); Alusud Embalajes Peru LTDA (Peru); Closure Systems International India Private Limited (India); Alcoa International Holdings Company (Delaware); Alcoa Spain, S.A. (Spain); Alcoa Inespal, S.A. (Spain); Alumina Espanola, S.A. (Spain); Derivados Del Floor, S.A. (Spain); Alcoa Italia S.p.A. (Italy); Alumet Etten B.V. (The Netherlands); Capsulas Metalicas, S.A. (Spain); A-CMI Scandinavian Casting Center ANS (Norway); Elkem Aluminum (Norway) Alcoa of Australia Limited (Australia); Australian Fused Materials Pty Ltd. (Australia); ACAP Singapore PTE Ltd. (Singapore); Eastern Aluminum PTY Ltd. (Australia); Cape Bougainville Joint Venture (Australia);

Mitchell Plateau Joint Venture (Australia); Portland Aluminum Smelter (Australia); Spent Potlining Project Joint Venture (Australia); Alumivensa Limited (Bermuda); Alutodo, S.A. De C.V. (Mexico); Asian-American (Tianjin) Packaging Systems Co. Ltd. (China); KAAL Asia, Limited (Hong Kong); KAAL Australia Pty. Limited (Australia); KAAL Australia Superannuation Fund Pty. Ltd. (Australia); KOBE Alcoa Transportation Products Ltd. (Japan); Korea Packaging System Co., Ltd. (Korea); KSL Alcoa Aluminum Company, Ltd. (Hong Kong); Alcoa Latin American Holdings Corporation (British Virgin Islands); ALUSUD Argentina S.A. Industrial Y Commercial (Argentina); ALUSUD Embalajes Chile LTDA (Chile); ALUSUD Embalajes Colombia LTDA (Colombia); ALUSUD Embalajes Peru LTDA (Peru); Aluminum Can Recycling Association Limited (United Kingdom); The Can Makers Limited (England); Structural Laminates Company (Pennsylvania); Alcoa Fujikura Ltd. (Delaware); AFL Do Brasil LTDA (Brazil); Michels GMBH & Co., K.G. (Germany); Michels Kabel Beteiligungs GMBH (Germany); Michels Kabelloonfektionalo BT (Hungary); Stribel Svenska AB (Sweden); Mintel Communications, L.L.C. (Delaware); Quality Control Services, L.L.C. (Delaware); Six "R" Communications, L.L.C. (Delaware); United States Alumoweld Corporation (Delaware); Alcoa International Holdings Company (Delaware); Derivados Del Floor, S.A. (Spain); Alcoa Italia S.p.A. (Italy); Alumet Etten B.V. (The Netherlands); Capsulas Metalicas, S.A. (Spain); A-CMI Scandinavian Casting Center ANS (Norway); Elkem Aluminum (Norway); Alcoa of Australia Limited (Australia); Australian Fused Materials Pty. Ltd. (Australia); ACAP Singapore PTE Ltd. (Singapore); Eastern Aluminum Pty. Ltd. (Australia); Cape Bougainville Joint Venture (Australia); Mitchell Plateau Joint Venture (Australia); Portland Aluminum Smelter (Australia); Spent Potlining Project Joint Venture (Australia); Alumivensa Limited (Bermuda); Alutodo, S.A. De C.V. (Mexico);

Asian-American Containers Manufacturing (Tianjin) Co., Ltd. (China); KAAL Asia, Limited (Hong Kong); KAAL Australia Pty. Limited (Australia); KAAL Australia Superannuation Fund Ptd. Ltd. (Australia); KOBE Alcoa Transportation Products Ltd. (Japan); Korea Packaging Systems Co., Ltd. (Korea); KSL Alcoa Aluminum Company, Ltd. (Japan); KAAL Asia, Limited (Hong Kong); Alcoa Kobe Transportation Products, Inc. (Delaware); Alcoa Chemie GmbH (Germany); Alcoa Chemi Nederland B.V. (The Netherlands); Alcoa Moerdijk B.V. (The Netherlands); Norton-Alcoa Proppants (Arkansas); Alcoa Remediation Management, Inc. (Delaware); A-CMI (Michigan); Alutodo, S.A. De C.V. (Mexico); Alcoa Alumina & Chemicals, L.L.C. (Delaware); Alumar Consortium—Alumina Refining Enterprise (Brazil); ACAP Singapore PTE Ltd. (Singapore); Alcoa ACC Industrial Chemicals Ltd. (India); Alcoa Kasei Limited (Japan); Alcoa Minerals of Jamaica, L.L.C. (Delaware); Halco (Mining) Inc. (Delaware); Compagnie Des Bauxites De Guinee (CBG) (Delaware); Maralco Limited (Japan); St. Croix Alumina, L.L.C.(Delaware); Suriname Aluminum Company, L.L.C. (Delaware); N.V. Hotelmaatschappij "Torarica" (Suriname); Suralco-Billiton Joint Venture #1 (Suriname); Suralco-Billiton Joint Venture #2 (Suriname); Alcoa Caribbean Alumina Holdings, L.L.C. (Delaware); Alcoa Minerals of Jamaica, L.L.C. (Delaware); B & C Research, Inc. (Ohio); Reserve Industries (New Mexico); Corporate Insurance and Reinsurance Company Limited (Bermuda); Delta Holdings, Inc. (Delaware); Hopewell International Insurance, Ltd. (Bermuda); Tortuga Casualty Insurance Company (Cayman Islands); United Insurance Company (Cayman Islands); Alumax Extrusions Mexico, S.A. De C.V. (Mexico); Comercializadora Alumax Extrusions Mexico S.A. De C.V. (Mexico); I De A., S.A. De C.V. (Mexico); Alumax Europe N.V. (The Netherlands); Alumax De Mexico); Alumax Holdings De Mexico, S.A. De C.V. (Mexico); Alumax De Mexico, S.A. De C.V. (Mexico); Alumax Extrusions Mexico, S.A. De C.V. (Mexico);

Asesoria Mexicana Empresarial, S.A. De C.V. (Mexico); Comercializadora Alumax Extrusions Mexico S.A. De C.V. (Mexico); Asesoria Mexicana Empresarial, S.A. De C.V. (Mexico); Yunnan Xinmeilu Aluminum Foil Co., Ltd. (China); Kawaneer Deutschland GmbH (Germany); SSF (Japan); Alumax Holdings De Mexico S.A. De C.V. (Mexico); Alumax De Mexico, S.A. De C.V. (Mexico); Alumax Extrusions Mexico, S.A. De C.V. (Mexico); Asesoria Mexicana Empresarial, S.A. De C.V. (Mexico); Comercializadora Alumax Extrusions Mexico S.A. De C.V. (Mexico); American Trim, L.L.C. (Delaware); Capsulas Metalicas, S.A. (Spain); Corporation for Innovation Development (CID) (Indiana); DYAX Corp. (Delaware); Greater Lebanon Hotel Enterprises, Inc. (Pennsylvania); Gulf Closures W.L.L. (Bahrain); Ontek Corporation (California); Shibazaki Seisakusho Limited (Japan); and Squaw Creek Coal Company (Indiana).

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PETITION FOR WRIT OF CERTIORARI

Aluminum Company of America ("Alcoa") respectfully petitions that a writ of certiorari issue to review the October 16, 1997 decision of the Benefits Review Board and November 12, 1998 order from the Eleventh Circuit.

OPINIONS BELOW

The November 12, 1998 order from the Eleventh Circuit U.S. Court of appeals denying Alcoa's Petition for Rehearing (App. 1a) is unreported. The April 30, 1998 decision from the Eleventh Circuit dismissing the Petition for Review of the subject Benefits Review Board decision (App. 3a) is unreported. The decision and order from the Benefits Review Board reversing the conclusion that the subject work was not covered employment, dated October 16, 1997 (App. 4a), is reported at 31 BRBS 130

(1997). The initial decision and order from the Administrative Law Judge denying benefits based on a lack of status, dated October 3, 1996 (App. 16a), is reported at 30 BRBS 741 (ALJ) (1996).

JURISDICTION

On November 12, 1998 the Eleventh Circuit U.S. Court of Appeals denied Petitioner Alcoa's Petition for Rehearing and the appeal and Petition for Review of the Benefits Review Board decision was dismissed for lack of jurisdiction. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHC" or "the Act") provides a remedy for maritime workers that meet a two part status and situs test. Section 2 of the Act defines status in the following provisions:

> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include—
>
> > (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law;

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902.

Section 3 of the Act defines situs as follows:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).

STATEMENT OF THE CASE

This case was initially filed with the U.S. Department of Labor as a Longshore claim for death benefits based on alleged asbestos exposure. The date of death was March 21, 1980 and the claim was filed March 17, 1994. Alcoa controverted the claim on April 14, 1994 preserving triable issues which included jurisdiction, situs and status under the Longshore Act.

A. The Alcoa Facility

This case involves a determination of Longshore jurisdiction in an asbestos claim.

The claim was filed by the widow of a millwright at an Alcoa facility in Mobile, Alabama. The facility manufactured calcine alumina from bauxite.[1]

The bauxite was delivered to the Alcoa plant on a conveyor system, following discharge by the adjacent Ala-

[1] The calcine alumina manufactured at the plant is not a uniquely maritime product. Alcoa has a similar plant located in Central Arkansas, which is nearly 40 miles from the nearest body of navigable water, the Arkansas River. (RX 14, p. 52). Significantly, the Mobile plant, from an operational standpoint, could function by means of rail car deliveries of bauxite alone (RX 14, Applegate, p. 52), without supplies from the Alabama State Docks.

bama State Docks. There were other deliveries of bauxite by railcar. The facility and the subject employment is described in considerable detail in the decisions below.

While the alleged asbestos exposure occurred in the manufacturing plant, Longshore jurisdiction was premised on a contention that decedent spent at least 2% of his employment in maintaining an overland conveyor system (App. 14a). There was no asbestos on the conveyor systems. (TR. 40, 108).

B. Course of Proceedings Below

1. *Before the Office of Administrative Law Judges*

The claim was referred to the Office of Administrative Law Judges for formal hearing. Trial was conducted on December 6, 1994 by ALJ Richard K. Malamphy. The issues presented included jurisdiction under the Act and a consideration of maritime situs and status; whether decedent was exposed to asbestos at the subject Alcoa facility; and whether the decedent's fatal lung cancer was attributed solely to cigarette smoking, asbestos exposure, or a combination of both. (App. 17a).

The "Decision and Order—Denying benefits based on a lack of status under Section 2(3) of the Act" was issued by the trial judge on October 3, 1996 (App. 16a). The decision was limited to a consideration whether the sporadic or occasional repair work by the decedent on overland conveyor systems was sufficient to trigger jurisdiction under the Act.

The conveyor systems were the putative nexus between the decedent and Longshore situs and status although there was no asbestos material on any of the conveyor systems (TR. 40, 108). The alleged exposure for the claimant would have to occur, if at all, in other parts of the manufacturing facility which had no relationship, whatsoever, with the discharge of cargo. The Court described the conveyor systems as follows:

> Mr. Hartwell, a former plant manager, described the facility and stated that vessels off loaded materials at the Alabama State Docks, adjacent to the Alcoa site.
>
> If bauxite was destined for Alcoa, it was placed on conveyor "A" at the state docks and delivered to conveyor "B" which was primarily on Alcoa property. Conveyor "A" was eight feet above conveyor "B" and material dropped from A to B. Material from conveyor "B" was delivered to conveyor "C" where it was transferred to building 20 or building 22 where the bulk was then stored.

(Decision below, App. 21a).

The Court determined that, at most, decedent spent "about one percent" of his time in work pertaining to the subject conveyors (App. 24a). The factual findings from Judge Malamphy included the following:

> Mr. Jones was considered to be a millwright welder until 1978, and then this designation was changed to general mechanic. Mr. Hartwell testified that a millwright welder spent less than one percent of his time in repairing conveyor systems.

(Decision below, App. 21a). This testimony referred to conveyors involved in transport of bauxite in overland transportation throughout the Alcoa facility.

There were three conveyor systems in issue: (1) the Alabama State Docks system used by State Docks employees to discharge ocean going vessels supplying the raw material consumed in the manufacturing process at Alcoa (App. 20a); (2) the Alcoa conveyor system which received bauxite from the State Docks conveyor, following discharge, and transported the bauxite overland into an Alcoa storage facility (App. 21a); and (3) the Alcoa underground tunnels which moved the bauxite through the grinding and manufacturing process at the plant (App. 5a, n.1).

With respect to the Alabama State Docks system, no Alcoa employees were used to operate this conveyor or discharge vessels (App. 5a). Alcoa was not the only customer, and the State Docks used the facility to discharge many vessels for other customers (App. 24a). Nor was there a mechanical connection between the Alabama State Docks system and the Alcoa system. (TR. 34, 39).

Once the bauxite left the Alabama State docks conveyor, and as soon as the bauxite touched the Alcoa conveyor, it was in overland transportation for purposes of the manufacture of calcine alumina.[2] It went either into a storage building or directly into a grinding operation. This conveyor system was not a continuous operation, and it was possible for the bauxite to come to rest in the storage building before it would be consumed in the manufacturing process. In fact, bauxite could remain in one of these storage buildings for up to three months. (RX 4, Applegate, p. 54).

The third conveyor system outlined above was the series of underground tunnels that moved bauxite through various grinding and refining processes (App. 5a, n.1). The bauxite changed forms, many times, during the manufacturing process before the final product was completed. The underground conveyor system ran from the storage building, and was not mechanically connected to the other systems.

Alcoa contended, and the trial judge concluded, that the occasional work with respect to the Alcoa conveyor system does not support a finding of jurisdiction under the Act. This was not regular Longshore employment, and occasional or sporadic work would not render decedent's

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2 Since the "port used conveyor 'A' for functions which were not limited to the delivery of bauxite to Alcoa," the ALJ concluded "Mr. Jones' job was analogous to a truck driver as defined in *Caputo*." (App. 24a).

work an *integral* or *essential* part of loading or unloading a vessel (App. 24a).

Claimant relied heavily on testimony that Decedent, while employed as a millwright at Alcoa, could [3] be required to maintain various conveyor systems used to transport bauxite through the manufacturing process at Alcoa. While there was no asbestos on any of these conveyor systems (TR. 40, 108), it was contended that this work provided for Longshore status, so that a claim could be presented if there was asbestos exposure elsewhere in the plant involving work in the purely land based manufacturing process.

The pertinent testimony from the former Plant Manager Ray Hartwell was that, as a millwright, Decedent might have performed repairs to the Alcoa conveyors on a sporadic basis, but that this was not *regular* employment, and certainly not *integral* to vessel loading or unloading operations. According to Mr. Hartwell:

> Q. I believe I asked you earlier, but what percentage would you say of a millwright welder's work at Alcoa would involve repairs to any of the conveyor systems, or could you state a percentage?
>
> A. I would say for a millwright welder, I don't think it would be 1 percent.

---

[3] There was no credible testimony that decedent actually turned a wrench on the conveyors. While a coworker, Mr. Howard, testified decedent performed repairs to the conveyors (TR 89), his testimony was discredited since he also contended there was asbestos insulation on the conveyors (TR 100). There was none (Hartwell, TR 40, 108). Further the two men had no overlapping employment as millwrights. Another witness Mr. Simon acknowledged that he never worked as a millwright or millwright welder (JX 1, p. 8). The record evidence credited by the ALJ was based on testimony from the retired Plant Manager that a millwright welder could be involved in this type of work "maybe 2 percent" of the time. (TR 75).

> Q. And what percent or portion of work as a general mechanic would you say would be involved in repairs to the caustic dock or the alumina dock?
>
> A. Maybe 2 percent.

(Hartwell, TR 75).

The Court also considered the potential that decedent might be involved in *occasional* repairs to a dock facility used for loading caustic into barges:

> A general mechanic could spend up to two percent of his day involved in repairs to the caustic dock or the alumina dock. A 48-inch conveyor belt delivered material from the alumina silo to barges at the alumina dock.

(App. 21a). There was no evidence presented that decedent actually worked on the caustic dock or machinery there [4] and Claimant conceded that "the evidence does not mention whether Mr. Jones was ever seen performing maintenance and repair work on the alumina dock and machinery" (Claimant's Post Trial Brief, p. 6), and conceded that the evidence did not indicate whether decedent worked on the caustic pipeline (*id.*, p. 7).

The trial court concluded that decedent "does not meet the definition of status under Section 2(3) of the Act" (App. 24a), since the Alcoa conveyor system was overland transportation of the cargo, following completed discharge operations. The court then concluded "Mr. Jones' job was analogous to the truck driver as defined in *Caputo.*" (App. 24a). The holding in the trial court was based on the following analysis of the facts and law:

> In this case there is no allegation that Mr. Jones ever worked on port authority machinery or was required to be on port property. Mr. Jones may have

---

[4] The ALJ noted "[t]here has been no suggestion in this case that Mr. Jones ever worked on the caustic dock or the alumina dock." (App. 23a).

> spent about one percent of his time repairing and maintaining conveyor "B" which belonged to Alcoa and was primarily on Alcoa property.
>
> When bauxite spilled from conveyor "A" to conveyor "B", the bauxite was now in the possession of the ultimate user. Alcoa did not store and resell bauxite, but performed a manufacturing process that turned bauxite into alumina.
>
> The undersigned concludes that Mr. Jones' duties were not an integral part of vessel loading or unloading. In *Caputo, supra,* the Court stated that employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime commerce are not covered.
>
> The port used conveyor "A" for functions which were not limited to the delivery of bauxite to Alcoa. For the above reasons, this administrative law judge finds that Mr. Jones' job was analogous to a truck driver as defined in *Caputo.*

(Decision below, App. 24a).

2. ***Before the Benefits Review Board***

No motion for reconsideration was filed. A timely Petition for Review was filed with the Benefits Review Board on December 5, 1996. On October 16, 1997 the Board reversed. After stating the applicable standard that the findings of fact and conclusions of law from the administrative law judges must be affirmed "if they are supported by substantial evidence, are rational, and are in accordance with law" (App. 5a), the Board reversed on the legal issue, whether there was Longshore jurisdiction. The holding is as follows:

> Although the maintenance of the conveyor belts was infrequent pursuant to the credited testimony of Mr. Hartwell, this work nevertheless confers coverage under the Act because it was a regular, non-discre-

> tionary part of the job. *See Schwalb,* 493 U.S. at 47, 23 BRBS at 99 (CRT). As the administrative law judge found that decedent could have been and actually was assigned to work on the bauxite conveyor about one percent of his time, Decision and Order at 7, **we reverse his conclusion that such work was not covered employment.** Lewis, 31 BRBS at 40-41.
>
> Accordingly, the administrative law judge's Decision and Order denying benefits is vacated. **The case is remanded to the administrative law judge for consideration of the remaining issues** raised by the parties.

(Decision below, App. 14a) (emphasis added.) The Board remanded for the administrative law judge to consider the remaining issues.

3. *In the Eleventh Circuit U.S. Court of Appeals*

A Petition for Review was filed in the U. S. Court of Appeals for the Eleventh Circuit on November 28, 1997. Claimant moved to dismiss the appeal and, after submission of briefs on the issue of jurisdiction in the Court of Appeals, the Eleventh Circuit dismissed the appeal on April 30, 1998 (App. 3a), finding that an order from the Benefits Review Board remanding the case was not a final order subject to review. The Court determined that it lacked jurisdiction based on the authority of 33 U.S.C. § 921(c) and *Jacksonville Shipyards, Inc. v. Estate of Verderane,* 729 F.2d 726 (11th Cir. 1984) (App. 3a).

A Petition of Rehearing was filed on May 20, 1998 based on the authority[5] that Circuit Courts have the

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[5] Petitioner also urged the Court to adopt the pragmatic finality exception to the preference against plenary review of remand orders from *Newpark Shipbuilding & Repair, Inc. v. Roundtree,* 698 F.2d 743, 748 (5th Cir. 1983). This exception indicated a remand order is appealable where the "question on appeal is to determine the proper legal standard to be applied." Since the

power, pursuant to 33 U.S.C. § 921, to review a Benefits Review Board decision which reversed an ALJ or which considered a legal issue. *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). As the Court in *Carozza* explained, if the Board decides a question of law, "[s]uch a determination is, however, subject to plenary review here. . . ." *Carozza, supra*, 727 F.2d at 77. The Court's power was derived, in part, from 33 U.S.C. § 921(b)(3) which in turn authorized the inferior court, the Benefits Review Board, to determine appeals regarding a substantial question of law. *Id.*, 727 F.2d at 76.

The Benefits Review Board has also determined that a decision denying benefits based solely on a jurisdictional determination is final for appeal. *Thessalonian Jackson v. Strauss Systems, Inc.*, 21 BRBS 266, n.2 (1988) applying the *Cohen* doctrine.[6] This was precisely the situation presented to the Board and the Eleventh Circuit in the case *sub judice*. Consequently, an appeal to the Benefits Review Board or Eleventh Circuit was proper. Other jurisdictional exceptions to the final judgment rule which have the same effect as the *Cohen* doctrine, which should permit review here, require a showing of hardship to the appealing party. *Robinson v. Tanner*, 798 F.2d 1378,

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Roundtree panel, eventually, rejected this exception, *id.*, 723 F.2d 399, 407, Petitioner relied on the initial *Roundtree* decsion, 698 F.2d at 748, and subsequent dissent, *Roundtree, supra*, 723 F.2d at 407 (Williams, Clark, Brown, Garza, JJ.) in seeking rehearing. It is significant that the initial *Roundtree* opinion was based on precedent from this Court that "the question of finality deserves a 'practical rather than a technical construction. . . .'" *Id.*, 698 F.2d at 748, citing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964).

[6] *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), which permits review of an interlocutory order if three criteria are met: (1) the order must conclusively determine the disputed question, (2) the order must resolve an important issue that is completely separate from the merits of the actions; and (3) the order must be effectively unreviewable on appeal from a final judgment.

1381 (11th Cir. 1986); *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1095 (5th Cir. 1977).

The hardship to Alcoa here would be the inconsistency presented by the logical consequence of the rulings from the Eleventh Circuit and Benefits Review Board, which would be to permit direct appeal of a final determination of Longshore jurisdiction only in the situation where there is a decision *upholding* jurisdiction and entering a compensation order. For the Court to disallow an appeal from an order *denying* jurisdiction and benefits would, in many instances, effectively preclude effective means of review since there is no basis to post a supersedeas bond or effectively stay payment of a compensation order pending an appeal.

There are literally hundreds of cases in which the Benefits Review Board routinely denies a Petition for Stay of Payment of Compensation pending appeal, based on a contention that recovery of the paid benefits would be unlikely in the event the decision is reversed on appeal. Such a double standard would be an impermissible violation of due process or equal protection guarantees of the U.S. Constitution. In other words, this should be deemed an unconstitutional penalty on successful litigants. *See*, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972) (overturning a double bond requirement).

Alcoa filed a Petition for Rehearing on May 20, 1998 which was denied by the Eleventh Circuit on November 12, 1998.

REASONS FOR GRANTING THE PETITION

There are three primary arguments for granting the writ. This Court's decision on the jurisdictional issues could impose certainty in this area of Longshore law and would affect literally hundreds of potential retiree asbestos claimants, in substantially land based operations at the Alcoa facility, and thousands of similar workers in other

employers' facilities. The writ should be granted, also, to resolve the conflict in the Circuits whether a fixed rule against *any* remand order is appropriate, or whether a more pragmatic approach is required by logic and due process. Finally, review on certiorari (or further consideration by the Eleventh Circuit) should be required to further define the limits of Longshore jurisdiction, and conflicting decisions whether "some" or "substantial" or "even one percent" employment is sufficient to invoke maritime status and Longshore jurisdiction.

A. Logic and Due Process review of certain remand orders, where the order conclusively determines a legal issue or legal standard, such as jurisdiction, or where the Benefits Review Board has exceeded its statutorily defined powers of review, and this Court should set uniform guidelines for the Circuits on this issue.

The United States Courts of Appeal are divided on the issue whether § 921 of the LHC permits appellate review of a final [7] decision from the Benefits Review Board on a dispositive legal issue which is disguised as an interlocutory "remand" order. The Third Circuit has permitted such a review where the Board reversed an order denying benefits and remanded for a calculation of amounts due. *Sea-Land Service, Inc. v. Director*, 540 F.2d 629, 631 n.1 (3rd Cir. 1976). The Eighth Circuit has also permitted such a review, e.g., where the Board clearly reversed an ALJ but remanded for additional findings. *St. Louis Shipbuilding & Steel Co. v. Casteel*, 583 F.2d 876, n.1 (8th Cir. 1978). The *Sea-Land* and *Casteel* cases are a perfect analogy since, here, the Board clearly reversed the order denying benefits, and added language to require additional findings on remand.

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[7] The Act provides "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred. . . ." 33 U.S.C. § 921(c).

Similarly, the Fifth Circuit has determined that, in the *proper* case, it can review a decision to remand. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1992). According to the Fifth Circuit, "logic and due process would require this Court be able to review the decision to remand." *Id.* at 944. *Mijangos* involved the rather transparent attempt by the Board to re-weigh the evidence and substitute its own fact finding for those of the ALJ. *Id.* at 945. The following standard applied:

> The Board does not have the authority to engage in a de novo review of the ALJ. The findings of the ALJ must be accepted unless they are not supported by substantial evidence in the record considered as a whole or unless they are irrational.

Mijangos, 948 F.2d at 944.

That is precisely what happened in the Court below. As in *Mijangos*, the Board in this proceeding exceeded its limited powers of review when it re-weighed the evidence and found that the subject employment was essential or integral to longshoring operations, and that it did not involve movement of discharged cargo in overland transportation. The same logic in *Mijangos* should therefore require review of what the Board actually did in this case as opposed to allowing the inquiry to end with the remand label, and a fixed rule regarding non-review of "remand" orders. This Court should not permit such an exercise in putting form over substance.

The Court should review the dispositive order of the Board now without waiting for the same dispositive issue to arise again after remand. The parties to this proceeding should be spared the enormous costs of further litigation when an appellate resolution of this issue now will conclusively determine the dispositive jurisdictional issues.

The following language from *Mijangos* should be considered:

> If this Court could not now review the decision to remand, the Board would be free to remand close cases until the ALJ produced an order that comported with the Board's view of the facts. The Board cannot usurp the fact-finding responsibility of the ALJ through its limited powers of review.

Mijangos, 948 F.2d at 944. In deciding to review the putative "remand" order the Fifth Circuit distinguished *Roundtree, supra*, 723 F.2d 399, which had previously held that an order remanding a case may not be appealed. *Mijangos*, 948 F.2d at 943. As noted above, the initial decision in *Roundtree*, 698 F.2d 743, was more in line with pronouncements of this Court [8] that "the question of finality deserves a 'practical rather than a technical construction. . . .' " *Id.* at 748.

As noted above, the Eleventh Circuit rejected the appeal in this case, with little analysis (App. 3a), based on the authority in *Jacksonville Shipyards, Inc. v. Estate of Verderane*, 729 F.2d 726 (11th Cir. 1984). Similar results may be found in the First Circuit [9] and D.C. Circuit [10]. It is apparent that a fixed rule against *any* appeal of a remand order, or a dispositive decision disguised as a remand order, is inappropriate. Such a rigid application of § 921 would allow the Benefits Review Board to continue to abuse and exceed its limited powers of review. Consequently, as *Mijangos* has recognized, since logic and due process may require the Courts to review a decision to remand, this Court should grant the petition for certiorari

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[8] This reference in *Roundtree* is taken from *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964). It is also in line with the *Cohen* doctrine which permits review of interlocutory orders on an important and conclusive legal issue. These arguments have been addressed in the discussion of the proceedings in the Courts below and for purposes of brevity will not be repeated in full here. *See*, discussion of *Cohen* and *Roundtree, supra*, at pp. 11-12.

[9] *Director v. Bath Iron Works Corp.*, 853 F.2d 11 (1st Cir. 1983).

[10] *WMATA v. Director*, 824 F.2d 94 (D.C. Cir. 1987).

and establish a uniform framework for review of Benefits Review Board decisions that are not truly interlocutory in nature, but actually and finally determine dispositive legal issues.

B. There is confusion presented as to the quantum of work required to invoke maritime or Longshore status, and this Court should resolve conflicting pronouncements whether "at least some" vs. "substantial" employment is required, and the decision below which permitted "about one percent" to suffice.

This Court should also resolve conflicting decisions below which purport to be based on the authority of this Court in *Caputo*,[11] *Pfeiffer*[12] and *Schwalb*[13]. The Court should clarify this area of the law and, consistent with the more recent *Latsis*[14] decision, impose a consistent standard for maritime status, requiring a substantial connection "in both duration and nature," 515 U.S. at ——, 132 L.Ed.2d at 338, and not "merely sporadic." *Id.*, 515 U.S. at ——, 132 L.Ed.2d at 337.

Certainty in this area of the law is required in at least three areas: (1) a determination when the unloading process is completed and overland transportation begins; (2) guidelines for the characterization of work as "integral" or "essential to" indisputably longshoring operations; (3) quantification of the requirement that Longshore jurisdiction applies to "persons whose employment is such that they spend *at least some* of their time in indisputably longshoring operations," *Caputo*, 432 U.S. at 273; and (4) clarification of the exclusion from Longshore coverage for occasional or sporadic work.

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[11] *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

[12] *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979).

[13] *Chesapeake and Ohio Ry. v. Schwalb*, 493 U.S. 40 (1989).

[14] *Chandris, Inc. v. Latsis*, 515 U.S. 347, 132 L.Ed. 2d 314 (1995).

The opinions in *Caputo, Pfeiffer* and *Schwalb* must be squared with this Court's analogous determination of seamen's status in *Latsis* which requires that the subject work, to confer maritime status, must be "substantial" work both "in point of time and work, and not merely transitory or sporadic." *Latsis,* 515 U.S. at ——, 132 L.Ed.2d at 337-338.

The Administrative Law Judge denied benefits and jurisdiction based on the authority of this Court in *Caputo, Pfeiffer* and *Schwalb*, by properly characterizing the issue in terms of *overland transportation*, and *occasional* or *sporadic* work which was not essential or integral to longshoring operations. As the *Caputo* decision established, employees whose responsibility involve the overland transportation of cargo, once it has been unloaded from a vessel, are not considered to be Longshore employees. *Id.* at 249. Consequently, the trial court properly analogized to the truck driver in *Caputo* who, while employed in a maritime situs,[15] is not considered to be engaged in a longshoring operation (or maritime status), since the cargo has been completely discharged prior to the involvement of the trucker.

> [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

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[15] Although the Board indicated the "parties agree that employer's facility constitutes a maritime situs" (App. 7a, n.4), Alcoa has continuously disputed that injury occurred in a maritime situs (TR. 7) since, as noted, there could be no exposure to asbestos materials on the conveyors in question. There was no asbestos materials on the conveyors (TR. 40, 108). The asbestos exposure (if any) was in the purely land based manufacturing operations of the plant and, consequently, this injury did not occur in a maritime situs.

Caputo, 432 U.S. at 267. The trial court also properly relied on precedent from this Court that Longshore status requires the subject task must be "clearly an integral part of the unloading process. . . ." *Caputo*, 432 U.S. at 271. The potential that decedent could have spent two percent of his time in repairs to a conveyor system thus could not be *essential* or *integral* to the unloading process.

The Benefits Review Board reversed, and reached an opposite conclusion, based on lower court authority in *Conye v. Refined Sugars, Inc.*, 28 BRBS 372 (1994) and *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981) by substituting its conclusion that "the conveyor system did not move stored cargo, but instead moved shipped cargo that was still in the unloading process." (App. 12a).

The Board interpreted its findings as "consistent with" *Schwalb* and *Caputo* by holding "that the loading process did not end until the raw material reached the storage facility." (App. 13a). The rationale was said to be that "the administrative law judge erred in establishing a boundary between Conveyor A and Conveyor B on the ground that the Port owns and maintains Conveyor A and employer owns and maintains Conveyor B." (App. 11a) The Court did not establish the boundary, however, since it was created by operation of law once cargo discharge operations were completed by the Alabama State Docks, and the title to the bauxite had passed.[16]

The Benefits Review Board also concluded that *even one percent*[17] of work in repairing and maintaining the

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[16] As the ALJ correctly observed, "when bauxite spilled from conveyor "A" to conveyor "B," the bauxite was now in the possession of the ultimate user. Alcoa did not store and resell bauxite, but performed a manufacturing process that turned the bauxite into alumina." (App. 24a).

[17] The Board reversed based on the ALJ finding that "decedent could have been and actually was assigned to work on the bauxite

Alcoa conveyor belts would justify coverage under the Act, based on the authority of *Schwalb*, "because it was a regular, non-discretionary part of the job." (App. 14a). This is inconsistent with Circuit authority that work which is "momentary or episodic" is not a regular part of decedent's duties and, thus, insufficient to convey maritime status. *Dorris v. Director*, 808 F.2d 1362, 1365 (9th Cir. 1987). As noted, it is also inconsistent with the analogous standard pronounced by this Court that, for determination of seamen's status, the subject work must be "substantial in point of time and work, and not merely sporadic." *Latsis*, 515 U.S. at —, 132 L.Ed. 2d at 337.

Although the issue was addressed in brief, none of the Courts considered whether Longshore jurisdiction could be extended despite the fact that decedent could not be engaged in arguable longshoring operations at the *time of injury*, i.e. the time of alleged asbestos exposure.[18] There was no asbestos on the conveyor systems in issue and, consequently, decedent could not be injured, i.e. exposed to asbestos, while performing the "indisputably longshoring operations" as required by *Caputo*.

No doubt, if the converse were true, i.e., if there was shown to be asbestos on the conveyor systems, Claimant and the Benefits Review Board would argue time of injury to be controlling. *See, e.g., Pittman Mechanical Contractors v. Director*, 35 F.3d 122, 126 (4th Cir. 1994)

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conveyor *about one percent* of his time. . . ." (App. 14a) (emphasis added.)

[18] The injury occurred when the decedent was exposed to the friable asbestos fibers. *See generally*, Arnold R. Brody, *Asbestos* in 8 Comprehensive Toxicology 393 (Robert A. Roth vol. ed., 1997). According to Brody, various structural, biochemical and molecular alterations occur at the first exposure which lead to diffuse asbestosis. *Id.* at 400. *But see, Bath Iron Works v. Director*, 506 U.S. 153, 163 (1993) determining for purposes of LHC claims that the injury does not occur until the time of manifestation of the disease. The Court should reexamine this conclusion in light of subsequent medical knowledge.

(awarding benefits when claimant was injured while in the act of repairing a pipeline deemed essential to the operation of a vessel.)

This Court has also recognized time of injury as a relevant inquiry in *Schwalb*, in which the Court specifically pointed out that the covered employees were connected with the loading process at the time of the injury. The decision of this Court in *Schwalb* referred to "maintenance services that they [the claimants] were performing when they were injured." 493 U.S. at 46.

Consequently, this Court should determine that Longshore jurisdiction should not be extended to the situation presented here, in which the connection to the Longshore Act is tenuous at best since the work in question involves the contention that the decedent might have spent an exceedingly small portion of his employment, at most two percent of his time, in servicing a conveyor system. Further, this Court should not allow Longshore jurisdiction to be extended to such an extreme where the connection with the Longshore Act does not even involve exposure to the substance alleged to have caused injury, friable asbestos fibers, since alleged exposure occurred, if at all, in purely land based manufacturing operations in another area of the Alcoa facility far removed from conveyors or vessel discharge operations.

In opposing a time of injury analysis, Claimant has argued dictum from *Pfeiffer* regarding Congressional concerns "that some workers might walk in and out of coverage." Id., 444 U.S. at 83. The fact is, however, that this Court has subsequently recognized that there are indeed workers who may walk in and out of coverage since the time of injury is a critical factor in many cases. As this Court has stated, "[T]here will always be a boundary to coverage, and there will always be people who cross it during their employment." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426 (1985). Further, this Court recognizes that "Congress did not seek to cover all of those

who breathe salt air." *Id.* at 423. Consequently, "persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." *Id.*

The requested writ should be granted since the facts of this case thus provide a basis to clarify the widely divergent interpretations of *Caputo, Pfeiffer* and *Schwalb*; resolve the rather uncertain boundaries of Longshore jurisdiction and status under the Act; and state a uniform standard applicable to maritime workers, whether Seamen or Longshoremen, that requires a showing of "substantial" work activity, and something more than occasional or sporadic work in covered employment. The Court can also clarify what is meant by the seemingly inconsistent pronouncements that "at least some" of the maritime workers' time must be spent in longshoring operations while, at the same time, requiring that the work must be regular, essential or integral to cargo operations in order for the Act to extend coverage.

The Court should also grant review to police the actions of the Benefits Review Board, and protect against limitations on Petitioner's right of appeal, which were so easily abrogated by the Board's *ipse dixit* proclamation that its decision was merely a remand order. For the Court to hold otherwise would condone the rather disingenuous remand label by the Benefits Review Board of a decision holding "we reverse his conclusion that such work was not covered." In doing so the Court would ensure that the Act is applied in a rational or equal manner, so that a litigant's appellate review provided in § 921 of the Act is not limited, in effect, to situations in which there is a compensation order and award of benefits.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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